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Supreme Court, U.S.
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In the

Supreme Court of the United States

MARK LEVY, Derivatively on behalf of Immunogen, Inc.,

Petitioner,

v.

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.,

Respondent,

– and –

IMMUNOGEN, INC.,

Nominal Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a holder of convertible preferred securities who is contractually limited from directly owning more than 4.9% of the issuer's common stock at *any one time* but has the right to dispose of more than 10% of the issuer's common stock within sixty days through *seriatum* conversions and sales of common stock is deemed to be the "beneficial owner" of such common stock under the plain meaning of Rule 13d-3(a) [17 C.F.R. §240.13d-3(a)] promulgated by the Securities and Exchange Commission ("SEC") pursuant to the Securities Exchange Act of 1934 (the "Exchange Act")?

Whether an interpretation of a rule advanced for the first time in an *amicus* brief more than twenty years after being promulgated by the SEC is entitled to binding deference where the proposed interpretation is contrary to the plain meaning of that rule?

Whether the SEC exceeded its statutory authority in adopting Rule 13d-3(a) as the basis for defining the term "beneficial owner" contained in Section 16(b) of the Exchange Act ("Section 16(b)") [15 U.S.C. §78p(b)]?

Whether a contractual provision specifically designed to avoid the reporting and liability provisions of the Exchange Act but which does not alter the nature of the economic interests or relationships is void either as a sham transaction or pursuant to the terms of Section 29(a) of the Exchange Act [15 U.S.C. §78cc(a)]?

PARTIES TO THE PROCEEDINGS

All parties to this proceeding are identified in the caption. In addition to these parties, the SEC participated in the proceedings before the United States Court of Appeals for the Second Circuit below as *amicus curiae*.

RULE 29.6 STATEMENT

In accordance with Sup. Ct. R. 29.6, petitioner states that Nominal Respondent Immunogen, Inc., on whose behalf this proceeding has been brought, does not have any publicly owned corporate parent, subsidiary or affiliate, nor does a publicly held company own 10% or more of Immuogen, Inc.'s stock.

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Petitioner Mark Levy ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on August 23, 2001, and the order denying the petition for a rehearing and suggestion for rehearing *en banc*, entered on November 28, 2001.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits is reported at 263 F.3d 10 (2d Cir. 2000), and is reproduced in the Appendix at A-1[1]. The opinion and order of the United States District Court for the Southern District of New York is reported at 2000 U.S. Dist. LEXIS 6301; [2000] Fed. Sec. L. Rep. (CCH) ¶90,981 (S.D.N.Y. 2000), and is reproduced in the Appendix at A-19. The decision of the court of appeals denying the petition for rehearing and suggestion for rehearing *en banc* is unreported and reproduced in the Appendix at A-17.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was issued on August 23, 2000. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by that court on November 28, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THE CASE

Petitioner, pursuant to Rule 14.1(f) of this Court, is attaching in the Appendix the verbatim text of the following statutes and regulations relevant to this petition for *certiorari*.

(1) Section 3(b) of the Exchange Act, 15 U.S.C. §78c(b); A-32.

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[1] References to the Appendix hereto are cited "A-___."

(2) Section 16(a) of the Exchange Act, 15 U.S.C. §78p(a); A-30.

(3) Section 16(b) of the Exchange Act, 15 U.S.C. §78p(b); A-30.

(4) Section 29(a) of the Exchange Act, 15 U.S.C. §78cc; A-32.

(5) Rule 16a-1(a)(1) promulgated under the Securities Exchange Act of 1934, 17 C.F.R. §240-16a-1(a)(1); A-33.

(6) Rule 13d-3 promulgated under the Exchange Act, 17 C.F.R. §240-13d-3; A-36.

STATEMENT OF THE CASE

Respondent Southbrook International Investments, Ltd. ("Southbrook") owned shares of convertible preferred stock ("Preferred Stock") of Immunogen, Inc. ("Immunogen") which if fully converted, would have resulted in Southbrook owning more than 10% of Immunogen's outstanding shares of common stock ("Common Stock"). The conversion feature of the Preferred Stock provided for its conversion into Common Stock at the lesser of: (i) a fixed rate; or (ii) a floating rate based upon the trading price of the Common Stock.

Southbrook's conversion rights were contractually limited in that Southbrook agreed not to directly own more than 4.9% of the Common Stock at *any one time*. Southbrook, however, had the right to convert the Preferred Stock through *seriatim* conversions and sales of Common Stock allowing it to dispose of more than 10% of the Common Stock *within a sixty day period*.

Southbrook purchased Common Stock through a series of conversions of the Preferred Stock at the floating rate. Within six months of these purchases, Southbrook sold Common Stock at materially higher prices earning Southbrook millions of dollars in short-swing profits.

Petitioner, acting through his counsel, wrote to the Board of Directors of Immunogen, as required by the statutory provisions of Section 16(b), demanding that Immunogen institute an action to recover these short-swing profits because Southbrook was subject to the liability provisions of Section 16(b) through its beneficial ownership of more than 10% of Immunogen's Common Stock. After Immunogen failed to take any action within a sixty day period, Petitioner commenced an action against Southbrook to recover these short-swing insider trading profits on behalf of Immunogen. Jurisdiction was based upon Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa.

Southbrook moved, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the action asserting that the contractual provisions limiting it from directly owning more than 4.9% of the Common Stock *at any one time* precluded Southbrook from being subject to the liability provisions of Section 16(b) which apply to beneficial owners of more than 10% of an issuer's common stock. Petitioner opposed the motion and argued that the power to dispose of common stock within a sixty day period constitutes beneficial ownership. Specifically, Petitioner argued that Rule 13d-3(d)(1)(i) provides that a person is deemed the beneficial owner of a security of which that person has *the right to acquire* beneficial ownership, as defined by Rule 13d-3(a), *within a sixty day period*. Rule 13d-3(a)(2), in turn, provides a definition of beneficial ownership which includes investment power consisting of, among other things, the power to dispose of such security. Petitioner argued that since Southbrook had the power to dispose of more than 10% of the Common Stock *within a sixty day period* through *seriatim* conversions and sales of Common Stock it was a beneficial owner of more than 10% of the Common Stock within the plain meaning of the relevant rules promulgated by the SEC. In addition, Petitioner argued that the contractual terms limiting Southbrook from directly owning more than 4.9% of the

Common Stock *at any one time* were void either as a sham transaction or pursuant to the terms of Section 29(a) of the Exchange Act because they acted as an implied waiver of a provision of the Exchange Act.

The United States District Court for the Southern District of New York granted Southbrook's motion to dismiss. Petitioner appealed that judgment to the United States Court of Appeals for the Second Circuit. Following oral argument, the Second Circuit requested that the SEC submit its views in an *amicus* brief. The SEC proceeded to engage in several closed door meetings with counsel for the parties to the action as well as several other purportedly interested parties, whose precise identities are unknown to Petitioner. The SEC ultimately submitted a brief advocating that the Second Circuit affirm the District Court's ruling.

Specifically, the SEC argued that Southbrook's "right to acquire" investment power over more than 4.9% of the Common Stock was not a current right because it was contingent upon the *seriatim* conversions and sales of Common Stock. At the same time, the SEC acknowledged that Southbrook's position as a securities holder of Immunogen raised issues of concern from a policy standpoint, including Southbrook's ability to affect a change in control by serially converting and selling shares to a single person and its ability to exert sufficient influence over the issuer to gain access to inside information through, among other things, its power to dilute existing holdings and drive down the stock price. The SEC further advocated in its brief that the Second Circuit was bound by the SEC's interpretations of its regulations in its *amicus* briefs.

The Second Circuit then affirmed the judgment of the United States District Court for the Southern District of New York dismissing Petitioner's claims. Among the Second Circuit's holdings was that it was bound by the SEC's interpretation of its regulations set forth in the SEC's *amicus* briefs.

Petitioner then petitioned the Second Circuit for a rehearing and a suggestion for a rehearing *en banc*. Petitioner argued that the SEC's interpretation of its own rules was inherently flawed and contrary to their plain meaning because Rule 13d-3(d)(1)(i) refers to "the right to acquire beneficial ownership of such security . . . within sixty days." Petitioner argued that for the SEC's interpretation to be correct, the rule should refer to "the right to acquire beneficial ownership of such *securities . . . at any one time* within sixty days." In addition, based upon, among other things, the recent decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), Petitioner argued that the United States Court of Appeals for the Second Circuit had improperly declared itself bound by the interpretation of the SEC's rules and regulations set forth in the SEC's *amicus* brief. Finally, Petitioner argued that to the extent the SEC's interpretation of its rules was correct, the rules were inconsistent with the provisions and purposes of Section 16(b) and thus exceeded the SEC's limited statutory authority contained in Section 3(b) of the Exchange Act.

The United States Court of Appeals for the Second Circuit denied the petition for rehearing.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals has Decided Important Federal Questions That Conflict With Relevant Decisions of this Court

A. The Second Circuit's Decision Conflicts With This Court's Precedent on Statutory Interpretation

The law of statutory interpretation provides that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981); *Estate of Cowart v. Nicklos Drilling Co.*, 503 U.S. 469, 475 (1990)).

This principle has been strictly adhered to in the context of the federal securities law. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (no cause of action was found to exist for aiding and abetting a violation of Section 10(b) of the Exchange Act because the statute did not expressly provide for such a claim). This same principle has been applied towards interpreting regulations, including those promulgated by the SEC. *See, e.g., Rosenberg v. XM Ventures*, 274 F.3d 137, 142 (3d Cir. 2001); *Atlantic Tele-Network v. Prosser*, 151 F. Supp. 2d 633, 641 (D.V.I. 2000).

The relevant regulatory language begins with Rule 16a-1(a)(1) which provides that "for purposes of determining whether a person is a beneficial owner of more than ten percent of any class of equity securities . . . the term 'beneficial owner' shall mean any person who is deemed a beneficial owner pursuant to Section 13(d) of the Act and the rules promulgated thereunder." 17 C.F.R. §240.16a-1(a)(1); A-33. Rule 13d-3(d)(1)(i) provides that "[a] person shall be deemed to be the beneficial owner of a security . . . if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) ***within sixty days*** . . . ." 17 C.F.R. §240.13(d)(1)(i); A-37 (emphasis added). Rule 13d-3(a), in turn, provides that a person is a beneficial owner when that person "directly or indirectly . . . has or shares: (1) Voting power . . . and/or (2) ***Investment power*** which includes ***the power to dispose***, or to direct the disposition of, such security." 17 C.F.R. §240.13d-3(a); A-36 (emphasis added).

Thus, substituting the language "beneficial ownership of such security as defined in Rule 13d-3(a)" contained in Rule 13d-3(d)(1)(i) for the actual language of Rule 13d-3(a)(2) — which is what the plain language of the rule provides for — results in Rule 13d-3(d)(1)(i) providing that a person is deemed the beneficial owner of a security it has the right to dispose of within sixty days. Pursuant to its terms, Rule 13d-3(d)(1)(i)

does not require in order for a person to be deemed a beneficial owner of a security that such person have the right to dispose of a specific percentage of the issuer's outstanding securities ***at any one time*** within sixty days. To the contrary, the rule is quite explicit in that under its terms any person with the power to dispose of ***a security within sixty days*** is the beneficial owner of ***that security***. If the SEC had intended to limit the application of Rule 13d-3(1)(i)'s definition of beneficial ownership of securities to those persons with the power to dispose of a specific percentage of the issuer's outstanding securities ***at any one time*** within sixty days, the rule should read "[a] person shall be deemed to be the beneficial owner of ***securities*** . . . which that person has the right to acquire beneficial ownership of ***at any one time*** within sixty days." The fact that the SEC did not do so should end the inquiry.

Nonetheless, contrary to this Court's holdings, the Second Circuit decided to examine the rule's perceived purpose and elevate that purpose over its plain language. In doing so, the Second Circuit walked into the precise minefield of potentially conflicting legislative purposes which so motivated this Court's adherence to the plain meaning of a statute in the *Central Bank* case. *See* 511 U.S. at 189 (legislative policies for expansive interpretation of Section 10(b) conflict with other policies favoring a more restrictive interpretation).

Specifically, the Second Circuit interpreted the policy of Section 13(d) of the Exchange Act and the rules promulgated thereunder by the SEC as being focused on "the right to acquire the ability to control." *Levy v. Southbrook International Investments, Ltd.*, 263 F.3d 10, 16 (2d Cir. 2001)(A-10). However, the actual language of the SEC release which the Second Circuit relies upon for its determination that the rule is concerned with the "right to acquire control" actually focuses on the "ability of the holder to *affect* control . . . ." *Filing and Disclosure Requirements Relating to Beneficial Ownership*, 1978 SEC LEXIS 1716 at *15, Exchange Act Release No.

14962, 14 SEC Docket 862, 1978 WL 14827 (April 21, 1978) (quoted in *Levy*, 263 F.3d at 16)(A-10)(emphasis added). *Accord, Wellman v. Dickinson*, 682 F.2d 355, 365 (2d Cir. 1982). Thus, the person owning the instrument need not be the person actually assuming control.

Here, Southbrook would have clearly been able to shift control of Immunogen based on rapid conversions of the Preferred Stock into Common Stock combined with rapid sales of the Common Stock. Therefore, the very policy which lays at the heart of Section 13(d) and Rule 13d-3(a) is, in fact, implicated in this action and, therefore, perceived policy grounds cannot be used as the basis for setting aside the plain meaning of the regulations.

B. The Second Circuit's Decision Conflicts With This Court's Decisions on the Level of Deference to the Views of an Administrative Agency Expressed in an Amicus Brief

The Second Circuit's opinion is also notable for its complete and utter genuflection before the altar of the SEC's views expressed in an *amicus* brief as to the proper interpretation of Rule 13d-3(a) "unless plainly erroneous or inconsistent with the regulation[s]." *Levy*, 263 F.3d at 14 (A-9). *Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2d Cir. 2000), upon which the Second Circuit relied, is premised upon this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997),which in turn specifically relied upon the standard for deference to administrative agencies articulated years earlier in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

However, this Court has held that the views of an administrative agency regarding the interpretation of a rule it promulgated expressed for the first time in an *amicus* brief are not entitled to *Chevron* deference. Instead, those views may be entitled to some measure of deference dependent upon, among

other things, the "persuasiveness of the agency's position." *United States v. Mead Corp*, 533 U.S. 218, 121 S. Ct. 2164, 2171 (2001)(citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)); *see also Mead*, 121 S. Ct. at 2177 n.19 and *Cf. Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988)(this Court held that it will not grant deference to an agency's litigation position advanced by its appellate counsel particularly where the position appears to be a *post hoc* rationalization for the agency's rules). Moreover, in the context of Section 16(b) litigation where the SEC has no enforcement authority, this Court has noted that "we would not afford [the SEC's views] the deference to which the views of the agency administering a statute are usually entitled. . . ." *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232, 259-60 (1976) (citing *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418 (1972)).

The position advocated by the SEC in its *amicus* brief and adopted by the Second Circuit in *Levy* also conflicts with well-settled principles of constitutional jurisprudence. SEC regulations promulgated pursuant to clear statutory authority have the force of law. *See Mead*, 121 S. Ct. at 2172. As such, the judiciary is the sole branch of government with the authority to interpret these regulations. *Accord Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995). Allowing a regulatory agency to interpret regulations having the force of law in a manner subject to binding deference when a case or controversy arises effectively eliminates the constitutionally required Separation of Powers, by permitting both legislative and judicial powers to be contained within one administrative agency. *See generally* J. F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 647-648 (1996).

II. The Court of Appeals Decision Conflicts With Decisions of Other Courts of Appeals

A. The Second Circuit's Decision on Deference to the Views of an Administrative Agency Expressed in an Amicus Brief Conflicts With a Decision of the Seventh Circuit on the Same Issue

Rule 13d-3(a) as to which the SEC proffered its opinions for the first time in its amicus brief on March 15, 2001, were adopted in 1977 — some twenty four years earlier. In a remarkably similar setting the Seventh Circuit in an *en banc* held that an interpretation made by an administrative agency twenty three years after a rule was promulgated was not entitled to deference. *See Atchison T. & S.F. Ry. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994) (*en banc*).

B. The Second Circuit Decision Conflicts With Decisions of the Seventh Circuit and First Circuit on the Issue of Sham Transaction

The Second Circuit, without any discussion on the issue, affirmed the District Court's decision that the sham transaction doctrine is not a basis for setting aside the provisions purportedly limiting Southbrook's ownership interest in Immunogen. *See*, *Levy*, 263 F.3d at 17-18 (A-13). The Seventh Circuit has held to the contrary that an "insider should not be permitted to speculate with impunity by varying the paper form of his transactions." *Bershad v. McDonough*, 428 F.2d 693, 697 (7th Cir 1970), *cert. denied*, 400 U.S. 992 (1971). The First Circuit has reached a similar conclusion. *See Riseman v. Orion Research, Inc.*, 749 F.2d 915, 921 (1st Cir. 1984).

III. The Court of Appeals Decision Decided an Important Issue of Federal Law Which Should be Decided by This Court

A. Proper Enforcement of the Federal Securities Laws is an Issue of National Importance

Following the stock market crash of 1929 and the resulting economic depression, Congress concluded that the prices of securities on national exchanges are susceptible to manipulation and that such manipulation can precipitate, intensify, and prolong widespread unemployment as well as the dislocation of trade, transportation and industry. *See* 15 U.S.C. §78b. In an effort to insure the maintenance of fair and honest securities markets, Congress enacted The Securities Exchange Act of 1934. *Id.* Congress declared in the Exchange Act that transactions in securities conducted upon national exchanges are affected with a national public interest which make it necessary to provide for the regulation of such transactions and related matters, including transactions by officers, directors, and principal security holders. *Id.*

As this Petition is being written, the entire country is witness to the economic carnage and human suffering which results from clever contrivances designed to avoid the strictures of the federal securities laws. Enron, once one of this nation's largest, and perceived as one of its most successful, companies has collapsed in flames causing literally *billions* of dollars in investor losses and reportedly wiping out the retirement savings of thousands of Enron employees. The cause of the collapse has now been traced to a series of contrived transactions designed to avoid the full disclosure of material facts relevant to a reasonable investor's decision of whether to invest in a security.

The case at Bar is but one of a thousand mini-Enrons where an insider with a preferred status profited handsomely while public shareholders and investors were being bled dry of their

investment's value. *See, e.g.*, R. Korman, *Investing it: Focus on Convertible Securities; If 'Toxic Convertibles' Drive Up, Watch Out For Sinkholes*, N.Y. Times, May 17, 1998 at Section 3, page 4, column 1) (available on LEXIS). Here, Southbrook has avoided any disclosure of its trading in Immunogen Common Stock as required under both Section 16(a) and Section 13(d) of the Exchange Act despite having had the right to rapidly dispose of more than 10% of the Common Stock and the power to affect both control of Immunogen and the price of the Common Stock.

The Exchange Act contains a statutory provision designed to prevent such gamesmanship. Specifically, Section 29(a) prohibits any waiver of any provision of the Exchange Act. *See* 15 U.S.C. §78cc(a) (A-32). The Second Circuit has held, in another action arising under the federal securities laws, that any device which serves as a limitation on the substantive rights to maintain an action under the Exchange Act constitutes a waiver within the meaning of Section 29(a). *See McMahan v. Wherehouse Entertainment, Inc.*, 65 F.3d 1044, 1050-51 (2d Cir. 1995), *cert. denied*, 517 U.S. 1190 (1996). Properly enforced in this action, Section 29(a) would also serve to preclude Southbrook's reliance on the contractual contrivances upon which it relied to argue that it was not a beneficial owner of more than 10% of the Common Stock.

B. Preventing the SEC From Exceeding its Statutory Authority in Promulgating Regulations is an Issue of National Importance

Section 3(b) expressly limits the SEC's authority in promulgating rules with respect to provisions of the Exchange Act to those which are consistent with the underlying statute. *See* 15 U.S.C. §78c(b). The term "such beneficial owner" as used in Section 16(b) has a statutory definition of "directly or indirectly the beneficial owner of more than 10 per centum" used in Section 16(a). *See, Gollust v. Mendell*, 501 U.S. 115, 117 (1991). The use of the term "directly or indirectly" has long been

understood to be directed at preventing avoidance or evasion of the statutory scheme. *See, e.g., White v. Indiana Travelers Assur. Co.*, 22 So. 2d 137 (La. Ct. Appeals 2nd Cir. 1945) ("the use of the term 'directly or indirectly' was designed to prevent the avoidance of the provisions of the legislation by any technical construction. . . . "); *Judd v. Bd. of Education*, 278 N.Y. 211, 212 (N.Y. 1938).

The legislative history of Section 16(b) easily supports this conclusion. Thomas Corcoran, one of the principle draftsman of the statute, testified that the statute was phrased to provide "the broadest term you can have." 15 Stock Exchange Practices, Hearing before Senate Comm. on Banking & Currency, 73 Cong., 2d Sess. 6556 (1934). Thus, beneficial owner "include[s] not only an equitable owner, but also a person who actually obtains or enjoys the benefits of security ownership, even though he has no enforceable rights thereto." T.G. Feldman and R.L. Teberg, *Beneficial Ownership Under Section 16 of the Securities Exchange Act*, 17 Wes. L. Rev. 1054, 1059 (1966).

Prior to 1991, there was no regulatory definition of "beneficial owner" and the interpretation of the term developed in the courts. *See Ownership Reports and Trading by Officers, Directors and Principal Stockholders*, Securities Exchange Act of 1934 Release 26333, 42 SEC Docket 570, 574 (1988). The definition which "developed" was a broad and multi-faceted one "includ[ing]: (1) the right to vote or control the voting of the securities; (2) the right to transfer the securities or control their transfer; (3) the right to receive the income from the securities or control the disposition of such income; and (4) the right to receive or control the disposition of the proceeds in liquidation." *Interpretative Release on Rules Applicable to Insider Trading and Reporting*, Securities Exchange Act of 1934 Release No. 18114, 1981 SEC LEXIS 679 at *14 & n.17 (Sept. 24, 1981).

Thus, courts long ago recognized that "[i]t matters not to the speculator who has title or possession or who can vote the stock or receive dividends." *Blau v. Ogsbury*, 210 F.2d 426, 427 (2d Cir. 1954). Instead, the "core object of §16(b) [is] the avoidance of short-swing profit by investors who trade in stock whose value they may be able to influence." *Morales v. Freund*, 163 F.3d 763, 766 (2d Cir. 1998).

There is no greater ability to influence the price of a stock than to sell out a massive number of the outstanding shares of common stock. *See* T.G. Feldman and R.L. Teberg, *Beneficial Ownership Under Section 16 of the Securities Exchange Act*, 17 Wes. L. Rev. 1054 at 1059-60 ("Merely by reason of the volume of his purchases and sales, the owner of large amounts of a security is able to drive the market price up or down.") Common sense is supported by academic studies on this issue. *See, e.g.*, R. W. Holthausen, R.W. Leftwich and D. Mayers, *Large-Block Transactions, the Speed of Response, and Temporary and Permanent Stock-Price Effects*, 26 Journal of Financial Economics 71-95 (1990).

Given this widespread understanding that the term "beneficial owner" was to be defined broadly, the use of the even broader term "directly or indirectly" in the statute, and the core purpose of Section 16(b), there can be no doubt that the 1934 Congress intended that the Courts look to the substance of the relationships at issue rather than the mere legal technicalities. Indeed, this devotion to the substance — rather than the legal form — of a relationship has long been the hallmark of jurisprudence in interpreting Section 16(b). *See, e.g.*, *Rattner v. Lehman*, 193 F.2d 564, 567 (2d Cir. 1952) (L. Hand, C.J., concurring); *Colby v. Klune*, 178 F.2d 872 (2d Cir. 1949).

Therefore, in the event that Rule 13d-3(a) has the meaning ascribed to it by the Second Circuit — a matter which Petitioner vigorously contests — it is inconsistent with the broad definition of the term "such beneficial owner" intentionally

provided by the 1934 Congress in adopting Section 16(b). As such, it would render the adoption of the Rule 13d-3 definition of "beneficial owner" for purposes of Section 16(b) inconsistent with the underlying statute and, thus, exceeds the SEC's authority under Section 3(b) of the Exchange Act. *Accord*, *Feder v. Martin-Marietta Corp.*, 406 F.2d 260, 268 (2d Cir. 1969) (setting aside an SEC regulation relating to the reporting of transactions by officers and directors as "arbitrarily inadequate") (citing *Greene v. Dietz*, 247 F.2d 689, 692 (2d Cir. 1957)).

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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